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No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JERRY LESTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 3a–11a)[1] are reported at 32 T.C. 1156. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 11–18) is not yet officially reported.

[1] Record references are to the Appendix to the brief for the taxpayer in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1960. (Appendix A, *infra*, p. 18.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The terms of a property setlement agreement, incident to divorce, provided that the taxpayer make periodic payments to his former wife for the support and maintenance of herself and their three minor children. The payments were to be reduced by one-sixth upon the marriage, emancipation or death of each child. The question is whether the agreement fixed one-sixth of the taxpayer's periodic payments as payable for the support of each of his three minor children with the result that the amounts so fixed were not deductible by the taxpayer as sums expended for the support of his former wife under the provisions of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes, Section 22(k) and Section 23(u) of the Internal Revenue Code of 1939, and Section 29.22(k)–1 and Section 29.23(u)–1 of Treasuary Regulations 111 are set forth in Appendix B, *infra*, pp. 19–22.

STATEMENT

Jerry Lester, the taxpayer, and his former wife entered into a property settlement agreement on April 16, 1951, in anticipation of divorce.[2] The agreement provided that the wife should have custody of their three children, then thirteen, eleven and nine years of age, respectively, subject to the taxpayer's reasonable right of visitation and of having the children with him for thirty days during the summer vacation. (R. 3a–4a; Appendix A, *infra*, pp. 11–12.)

Paragraph 11 of the agreement provided for the payment of the following amounts by the taxpayer to his former wife for the support of herself and their three minor children: for the period commencing with the effective date of the agreement and ending December 31, 1951, fifty per cent of the husband's gross income but not in excess of $50,000; for each of the following two calendar years, twenty-five per cent of the husband's annual gross income but not in excess of $45,000 each year; for each year immediately thereafter, twenty per cent of the husband's annual gross income but not in excess of the sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to her,

[2] The parties already were separated. The wife remained a resident of California in 1951 and 1952, while the taxpayer moved to New York. On April 27, 1951, a California court entered an interlocutory judgment of divorce between the taxpayer and his wife which ratified, confirmed and approved the agreement of April 16, 1951. The final decree of divorce in the California action was entered on November 5, 1952. (R. 3a, 5a–6a.)

shall equal $15,600. All payments were to terminate upon the death of the husband or the wife or upon the remarriage of the wife. (R. 4a–5a; Appendix A, *infra,* pp. 12–13.) In addition, paragraph 11(i) provided (R. 5a; Appendix A, *infra,* p. 13):

> In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

The taxpayer also agreed that he would pay any extraordinary medical and dental expenses of the children so long as they were minors and unemancipated (R. 5a, Appendix A, *infra,* pp. 12–13) and that so long as he was required by the agreement or by law to support his children he would cause them to be jointly named as beneficiaries to the extent of $30,000 of the proceeds payable under three insurance policies (Appendix A, *infra,* p. 13).

Pursuant to the agreement, the taxpayer made periodic payments of $23,000 in 1951 and $39,500 in 1952. He deducted these amounts on his income tax returns for those years as alimony. (R. 6a; Appendix A, *infra,* p. 13.) In deficiency proceedings, the Tax Court upheld the Commissioner's determination disallowing one-half of each claimed deduction, on the basis that half the amounts paid were fixed by the agreement as payable for the support of the three minor children of the taxpayer. (R. 10a, 11a; Appen-

dix A, *infra*, p. 13.) The Court of Appeals reversed, holding that the agreement did not fix the amounts payable for child support. (Appendix A, *infra*, pp. 16, 18.)

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals expressly disagrees with decisions of the Ninth Circuit in *Eisinger* v. *Commissioner*, 250 F. 2d 303, certiorari denied, 356 U.S. 913, and of the First Circuit in *Metcalf* v. *Commissioner*, 271 F. 2d 288. Each of these cases presents the identical question of statutory construction—a question which is a frequently recurring one. A uniform interpretation of the underlying statutory provisions is essential to the equitable administration of the tax laws and to the planning of economic arrangements between parties to divorce proceedings and separation agreements.

1. The Second Circuit, following two of its earlier decisions,[3] interprets Sections 22(k) and 23(u) of the 1939 Code (Appendix B, *infra*, pp. 19–20) [4] as providing that periodic payments by a husband to his divorced or legally separated wife are "payable for the support of minor children" only when their use is

[3] *Weil* v. *Commissioner*, 240 F. 2d 584, certiorari denied, 353 U.S. 958, and *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497.

[4] Sections 22(k) and 23(u) of the 1939 Code (analogous to Sections 71 and 215 of the 1954 Code) provide that a divorced or legally separated wife shall include in her income, and her husband may deduct, periodic payments made pursuant to the decree or written instrument incident to the divorce or separation. Under these sections the wife does not include in her income, and the husband cannot deduct, amounts fixed by the decree or agreement as payable for the support of the husband's minor children.

restricted by the terms of the decree or agreement *exclusively* to that purpose and the wife has "no independent beneficial interest therein." The Second Circuit's view is that the possibility that the wife may have some discretion with respect to the allocation of particular sums to the children from time to time provides her with a control substantially equivalent to full-fledged ownership of the payments, with the result that the husband may deduct (and the wife must pay tax upon) the entire amount of the periodic payments.

In contrast, the Ninth Circuit in *Eisinger* v. *Commissioner, supra* (purporting to state the general rule (250 F. 2d at p. 308)), and the First Circuit in *Metcalf* v. *Commissioner, supra,* have resolved the same question on the basis that if the agreement, taken as a whole, reveals an intention by the parties to earmark or designate a definite portion of the husband's periodic payments for the support of his minor children (as distinguished from amounts payable for alimony), then the "terms of the decree or written instrument fix * * * a sum which is payable for the support of minor children of such husband" and he may not deduct that sum in computing his liability for income tax.[5] In both *Eisinger* (250 F. 2d at 306) and *Metcalf* (271 F. 2d at 291), the courts,

[5] See, also, *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7), and *Budd* v. *Commissioner*, 177 F. 2d 198 (C.A. 6), to the same effect; and see *Deitsch* v. *Commissioner*, 249 F. 2d 534, 536 (C.A. 6).

though reconciling the cases on their particular facts, expressly criticized the language employed by the Second Circuit in the *Weil* and *Hirshon's Estate* cases *supra*.[6]

The Second Circuit does not purport to draw any distinction between the allocation provisions of the agreements in *Eisinger* and *Metcalf* and those in *Lester*, but expressly disagrees with the interpretation of the statutes by the Ninth and First Circuits (Appendix A, *infra*, pp. 15–16). It flatly rejects the view that the agreement should be examined as a whole to determine whether any portion of the payments have been adequately "earmarked" as payable for child support.

2. The question in this case is a frequently recurring problem in the administration of the revenue laws[7] and a uniform interpretation of the

[6] Pointing out the difference in approach, the First Circuit stated (*Metcalf* v. *Commissioner*, *supra*, 271 F. 2d at 291):

> Where a home is run as a unit, as is contemplated in the case of a parent having custody of minor children, it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has "no independent beneficial interest therein."

[7] As the result of a preliminary search, the Internal Revenue Service informs us that there are now pending administratively (or in the Tax Court) at least 82 other cases involving the same issue. *Ashe* v. *Commissioner*, 33 T.C. 331, is pending before the Sixth Circuit: *Haber* v. *Commissioner*, decided May 4, 1960, (1960 P.H.T.C. Memorandum Decisions, par. 60,084), is pending before the Fourth Circuit on the husband's appeal and before the Second Circuit on the Commissioner's protective appeal.

statute is of obvious importance.[8] The present lack of uniformity leads to inequity—to differing tax treatment of parties who have entered into agreements of the same kind. Furthermore, the incidence of tax is a substantial factor for consideration by parties planning such arrangements for the future. In view of the present conflict among the circuits, the economic consequences of many practical arrangements of this type cannot be forecast with any certainty, particularly since the incidence of tax may be altered by subsequent changes of residence of the parties. Under certain circumstances, this may result in hardship for one of the parties or for the children, or in unwarranted tax avoidance.[9]

The resolution of the conflict by this Court would avoid substantial continuing litigation on this subject, make for uniformity and certainty of interpretation, and enable divorcing or separating spouses to enter

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[8] With respect to Sections 22(k) and 23(u), *inter alia*, H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 372, 427) states:

> * * * the amended sections will produce uniformity in the treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony.

See, also, S. Rept. No. 1631, 77th Cong., 2d Sess., p. 83 (1942-2 Cum. Bull. 504, 568) to the same effect.

[9] For example, children and divorced wives in the circumstances of the *Lester*, *Eisinger* and *Metcalf* cases might suffer disadvantage by the imposition of tax if they changed their residences to areas within the jurisdiction of the Second Circuit. Similarly, husbands in such circumstances might avoid tax by a change of residence. See *Häber* v. *Commissioner*, noted in footnote 7, *supra*, in which the husband's and wife's cases are pending before different courts of appeals.

into arrangements for the support of their children with knowledge of the income tax consequences regardless of future changes of residence. Without regard to the correctness of the holding in the instant case, the sharp conflict between the circuits should be resolved.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1960

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 301—October Term, 1959

(Argued May 3, 1960. Decided June 6, 1960)

Docket No. 26020

JERRY LESTER, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Before LUMBARD, *Chief Judge,* HAND, *Circuit Judge,* and JAMESON, *District Judge.*

On petition to review a decision of the United States Tax Court assessing against the petitioner deficiencies in income taxes for the years 1951–52.

HAND, *Circuit Judge:*

Lester, the taxpayer, petitions to review an order of the United States Tax Court, holding him liable for deficiencies in his income tax for the years 1951–52, based upon the disallowance of deductions claimed by him as payments of alimony. The facts were as follows: Lester and his wife had three children, aged 13, 11 and 9. They lived in Los Angeles and had been married on August 24, 1934. On April 16, 1951, while the wife was still living in California, though he had himself moved to New York, they entered into an agreement in anticipation of a divorce. This agreement provided that the custody and control of the children should be given to the wife subject to plaintiff's reasonable right of visitation and of hav-

ing the children with him for thirty days during the summer vacation. The important provision was paragraph 11, which we quote in part:

> 11. The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, Judy Lester, Joan Lester and Jay Lester, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):
>
> (a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.
>
> (b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.
>
> (c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of the total sum of $45,000.
>
> (d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of husband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.
>
> (f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any

of the children of the parties so long as they are minors and are not emancipated.

* * * * *

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

By paragraph 8(e) the parties also agreed that, so long as the husband was required by the agreement or by law to support the children, he would cause them to be jointly named as beneficiaries to the extent of $30,000 of the proceeds payable under three life insurance policies assigned by his wife to him.

The taxpayer performed the agreement by paying to his wife the sums specified in paragraph 11 and deducted on his income tax returns as alimony the "periodic payments" made during the years 1951–52. The Commissioner and the Tax Court held that he was entitled to deduct only one half of these as alimony, because subdivision (i) of paragraph 11 showed that one half was all that she was entitled to keep for her own use, the other half being paid for the maintenance and support of the children.

The question involved has been the subject of a number of decisions as to the proper interpretation of § 22(k) of the Internal Revenue Code of 1939, which provides that "periodic payments * * * in discharge of a legal obligation which, because of the marital or family relationship is imposed upon * * * such husband * * * shall be includible in the gross income of such wife." The "periodic payments" prescribed by the agreement were clearly imposed upon the taxpayer because of a "marital or family relationship"; and were therefore deductible by him. However, a difficulty arises from the succeeding sentence of § 22(k), which reads as follows: "This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." The courts are not unanimous as to what is meant by the phrase, "fix in terms of an amount of money or a portion of the payment." In the case at bar the Commissioner and the Tax Court have read the language in paragraph 11(i) of the agreement as "fixing" one half of all the payments made to the wife as sums "payable for the support of minor children of such husband." If they are so read, the decision of the Tax Court was of course right; if not, all the payments are to be regarded as gross income of the wife, and the deficiencies should be expunged.

In *Weil* v. *Commissioner*, 240 Fed. (2) 584, we held that a very similar agreement did not "fix * * * in terms * * * of a portion of the payment" what the wife was to spend for the support of the children. We held, p. 588, Judge Medina writing, "that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accord-

ingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose and the wife must have no independent beneficial interest therein." In that case the agreement did not provide for any reduction in the "periodic payments" if the wife remained unmarried, but it did reduce them upon the death or marriage of a child if she did remarry. The same reduction was to be made also in case a child cared to live apart from the wife after the wife remarried. So far as we can see our second decision, *Hirshon's Estate* v. *Commissioner of Internal Revenue*, 250 Fed. (2) 497, neither adds to, nor detracts from, the first. *Deitsch* v. *Commissioner*, 249 Fed. (2) 534 (C.A. 6), accords with our interpretation and distinguished a former decision of the same court (*Budd* v. *Commissioner*, 177 Fed. (2) 198) on the ground that a fixed sum had been "earmarked" as payable for a son's support.

In *Eisinger* v. *Commissioner*, 250 Fed. (2) 303 (C. A. 9) and *Metcalf* v. *Commissioner*, 271 Fed. (2) 288 (C. A. 1) the "periodic payments" were not allocated as between support of the children and alimony, but they were reduced as each child reached majority or died. Both courts found in the provisions for such reductions evidence that the "terms" of the agreements had from the outset "fixed" a portion of the "periodic payments" as being "for the support" of the children. For this reason they charged the wife's gross income with only the remaining portion of the payments. It is quite true as Judge Aldrich said in *Metcalf* v. *Commissioner*, *supra*, 291, that "it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has 'no independent beneficial interest therein.'" However, the language of the statute seems to us

not to submit itself to be recast so freely. That part of a "periodic payment" that is not to be charged to the husband's gross income is only that which the "written instrument" (shall) "fix, in terms of * * * a portion of the payment, as a sum which is payable for the support," etc. It by no means follows, because when a child dies or marries or reaches twenty-one the "periodic payments" are diminished, that from the outset that child's support has been "fixed" by the amount of the possible reduction. Indeed such a construction would defeat what is the basic meaning of such an agreement, for the mother is to be free to use her judgment in allocating the collective unit among her children and herself. It is true that it is assumed that she will use the payments to some extent to support the children, but we need not say that there could never be occasions when a court would overrule her discretion. In any case she is ordinarily free to allocate the payments as she thinks best, from time to time, spending on herself what she may think will in the end be for the best of the group. The fact that, when the group changes, the "periodic payments" are reduced in a "fixed" proportion does not indicate that meanwhile the wife's discretionary power has been limited. Indeed, we do not see why, if the existing allocation at the time of a child's death, marriage, or majority were to determine his proportion of the earlier payments, it does not follow that the wife's discretion is taken away altogether. Unless we have misapprehended its meaning, Congress intended to tax the wife on all the payments unless the agreement itself declared in what proportion she must allocate them to the children.

The Tax Court seems to have thought that it would be unfair to impose upon the wife an income tax upon that part of the payments that might be used to discharge the husband's duty to support the children. The sentence of §22(k) that we are discussing recog-

nizes this possibility and attempts to provide against it, but Congress apparently thought that it was impossible to do so except when the agreement "fixes" in advance some "portion of the payment, as a sum which is payable for the support of minor children." When the agreement does this the spouses have made the best forecasts they can as to what the allocation shall be. Like all other forecasts they are necessarily no more than guesses, and what seems a fair division today will often prove grossly unfair tomorrow. But there is no escape from accepting that chance except by repeated appraisals of the relative needs of the individuals making up the group: and we agree with Judge Aldrich that that "is highly impractical, if not impossible."

Moreover, it is not so gross a solecism as it might appear to make the wife's income tax depend in part upon receipts that she gives to others. If, as we have tried to show, there is no other way to meet the prime purpose of the spouses but to leave the allocation from time to time in the wife's hands, it is an unavoidable consequence that she will be taxed on whatever she gives away. We cannot find in that an injustice that demands the disregard of plain language patently chosen with care. In spite of that burden, the control of the wife still has most of the component interests that in combination are "property." She may believe it desirable at times not to allocate to a child any "part" of a "periodic payment," because the child needs her continued supervision at home, and that free spending money is the one thing to be avoided. When all is said there is little difference between a control so nearly absolute as this and full fledged "ownership." "But what are the rights of ownership? They are substantialy the same as those incident to possession. Within the limits prescribed by policy the owner is allowed to exercise his power

over the subject-matter uninterfered with and is more or less protected in excluding others from such interference. The owner is allowed to exclude and is accountable to no one. The possessor is allowed to exclude all but one and is accountable to no one but him." (Holmes, *The Common Law*, p. 246.)

Order reversed; tax deficiencies expunged.

JUDGMENT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June one thousand nine hundred and sixty.

Present: Hon. J. EDWARD LUMBARD, Chief Judge, Hon. LEARNED HAND, Circuit Judge, Hon. WILLIAM J. JAMESON, District Judge, *Circuit Judges*.

JERRY LESTER, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEALS FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and that the tax deficiencies be and they hereby are expunged in accordance with the opinion of this Court.

/S/ A. DANIEL FUSARO,
Clerk.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * * *

(k) [As added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written in-

strument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence; such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

* * * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(u) [As added by Section 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments.—Income to Former Wife.*—

* * * * * *

(d) [As amended by T.D. 5425, 1945 Cum. Bull. 10] *Payments for support of minor children.*—Section 22(k) does not apply to that

part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for such support. For example, if the husband is by terms of the decree required to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 22(k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

Sec. 29.23(u)–1. *Periodic Alimony Payments.*—A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be in-

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cluded in the income of the payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22(k)–1. (For definition of husband and wife in such cases, see section 3797(a)(17).)

* * * * *

Sections 39.22(k)–1 and 39.23(u)–1 of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, effective January 1, 1952, are to the same effect as the sections set out above.

U.S. GOVERNMENT PRINTING OFFICE 1960